Supreme Court, U.S.
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In the Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Tennessee has required a publisher of telephone directories to display the names and logos of competing telephone companies on the cover of the white pages directories that it publishes for its affiliated telephone company. The question presented is whether the constitutionality of state-compelled commercial speech that is not necessary to correct a misstatement should be judged by the First Amendment test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), or by the more lenient test set forth in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

PARTIES TO THE PROCEEDING

The petitioner is BellSouth Advertising & Publishing Corporation. The respondents are the Tennessee Regulatory Authority, AT&T Communications of the South Central States, Inc., MCI WorldCom Network Services, Inc. (formerly MCI Telecommunications, Inc.), and XO Communications, Inc. (formerly NEXTLINK Tennessee, Inc.).

RULE 29.6 STATEMENT

Petitioner BellSouth Advertising & Publishing Corporation is a wholly-owned subsidiary of BellSouth Enterprises, Incorporated. BellSouth Enterprises, Incorporated, is a wholly-owned subsidiary of BellSouth Corporation, which is publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 10

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE FIRST AMENDMENT STANDARD FOR EVALUATING GOVERNMENTAL COMPULSION OF COMMERCIAL SPEECH THAT IS NOT NECESSARY TO PREVENT DECEPTION 12

A. In *Zauderer*, The Court Acknowledged An Exception To *Central Hudson* For Mandatory Disclosures That Serve The Purpose Of Preventing Consumer Deception 12

B. There Is A Split Of Authority Regarding The Relationship Between *Central Hudson* And *Zauderer*. 16

C. *Zauderer*'s "Rational Relationship" Test Should Apply Only When The State Requires Disclosure To Prevent A Genuine Risk Of Consumer Deception 21

TABLE OF CONTENTS – continued

Page

II. THE COURT SHOULD GRANT REVIEW TO AFFIRM THE FIRST AMENDMENT RIGHTS OF CORPORATIONS *NOT* TO CARRY THE MESSAGES OF THEIR COMMERCIAL COMPETITORS 26

CONCLUSION 30

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. *Rhode Island*, 517 U.S. 484 (1996) 13, 14

Borgner v. *Brooks*, 284 F.3d 1204 (11th Cir. 2002), petition for cert. filed, No. 02-165 (July 29, 2002) 17

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) ..... *passim*

Central Illinois Light Co. v. *Citizens Util. Bd.*, 827 F.2d 1169 (7th Cir. 1987) 28

Douglas v. *State*, 921 S.W.2d 180 (Tenn. 1996) 18

Edenfeld v. *Fane*, 507 U.S. 761 (1993) 14

Glickman v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) 7

Greater New Orleans Broad. Ass'n v. *United States*, 527 U.S. 173 (1999) 13, 26

Harris v. *Agency for Health Care Admin.*, 671 So. 2d 230 (Fla. Dist. Ct. App. 1996) 19

Ibanez v. *Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994) 15

International Dairy Foods Ass'n v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996) 19, 20

Kleese v. *Pennsylvania State Bd. of Funeral Directors*, 738 A.2d 523 (Pa. 1999) 18

Lorillard Tobacco Co. v. *Reilly*, 121 S. Ct. 2404 (2001) 13

Mason v. *Florida Bar*, 208 F.3d 952 (11th Cir. 2000) 16, 17

TABLE OF AUTHORITIES – continued

Page(s)

National Electrical Manufacturers Ass'n v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), cert. denied, 122 S. Ct. 2358 (2002) 20

Pacific Gas & Elec. Co. v. *Public Utils. Comm'n*, 475 U.S. 1 (1986) ..... *passim*

Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1994) 14, 22

State v. *Casino Mktg. Group, Inc.*, 491 N.W.2d 882 (Minn. 1992) 17

Thompson v. *Western States Med. Ctr.*, 122 S. Ct. 1497 (2002) 13

Tillman v. *Miller*, 917 F. Supp. 799 (N.D. Ga. 1995), aff'd, 133 F.3d 1402 (11th Cir. 1998) 17

United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) ..... *passim*

U S West Communications, Inc. v. *Thoms*, 1999 WL 33456553 (S. D. Iowa Jan. 25, 1999) 18

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 15, 24

Walker v. *Board of Prof'l Responsibility*, 38 S.W.3d 540 (Tenn. 2001) 18

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 22

Wooley v. *Maynard*, 430 U.S. 705 (1977) 22

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) ..... *passim*

Statutes, Rules And Regulations

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – continued

Page(s)

Tenn. Code Ann. § 65-4-124(c) 3
Tenn. Comp. R. & Regs. 1220-4-2-.15 (1997) 6

PETITION FOR A WRIT OF CERTIORARI

BellSouth Publishing & Advertising Corporation ("BAPCO") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The decision of the Supreme Court of Tennessee (App., *infra*, 1a-30a) is reported at 79 S.W.3d 506. The decision of the Court of Appeals of Tennessee (App., *infra*, 31a-144a) is reported at 2001 WL 134603. The decisions of the Tennessee Regulatory Authority ("TRA") (App., *infra*, 145a-160a, 161a-169a) are reported at 1998 Tenn. PUC LEXIS 15 and 1998 Tenn. PUC LEXIS 17.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 2, 2002. A timely petition for rehearing was denied on August 21, 2002 (App., *infra*, 170a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law abridging the freedom of speech."

STATEMENT

In recent years, this Court has developed a substantial body of law regarding the protection afforded by the First Amendment to commercial speech. Applying an intermediate level of scrutiny under the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the Court has invalidated many governmental restrictions on truthful and nonmisleading commercial speech. In other decisions, the Court has affirmed that corpo-

rations, like individuals, have an important protected interest in *not* uttering or supporting messages with which they disagree. Accordingly, the Court has struck down regulations compelling corporations to support the advertising of their commercial competitors or to publish speech by third parties that opposes their interests.

Years before these speech-protective decisions, the Court also ruled, in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), that the government may impose on commercial entities disclosure requirements that are reasonably related to the goal of preventing the deception of consumers. This case concerns the proper scope of that decision. In *Zauderer*, the Court approved under the "reasonable relationship" test a requirement that an attorney include in an advertisement a factual statement that was necessary to prevent the advertisement itself from misleading consumers. Here, however, the Tennessee Supreme Court relied on *Zauderer* in approving a far more intrusive example of compelled speech: an administrative order requiring a publisher of telephone directories to print the names and logos of competitors on the cover of its products. The court approved this mandatory co-branding despite the agency's concession that the existing telephone directory covers were not misleading.

The scope of the government's power to impose content-specific requirements on commercial speech is an important and recurring issue that deserves the Court's attention. The Tennessee Supreme Court has deemed *Zauderer* to establish "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. Other courts also have applied *Zauderer*'s "reasonable relationship" test to all forms of compelled commercial speech, whether or not the mandated speech is intended to prevent consumer deception. But other courts have been more solicitous of a commercial actor's right *not* to speak; these courts have held that *all* governmental efforts to regulate non-misleading speech – whether in the form of limitations on speech or requirements to speak –

must satisfy the *Central Hudson* test. Because the government action here could not have satisfied that test, this case presents the issue of whether *Zauderer* or *Central Hudson* sets the standard for evaluating the constitutionality of such compelled commercial speech.

Intertwined with this issue is another question of substantial importance: when, if ever, may the government compel a commercial speaker to carry the commercial messages of third parties with which it disagrees? The administrative orders approved by the Tennessee Supreme Court did not merely mandate publication of an uncontroversial factual message, but required the publisher to transform the cover of its own product into a billboard for other companies' names and trademarks. In analogous contexts, the Court has found such compelled support of an opposing message to be deeply offensive to the First Amendment. This case presents an ideal vehicle for the Court to clarify the reach of those principles.

1. BellSouth Telecommunications, Inc. ("BST"), a subsidiary of BellSouth Corporation ("BellSouth"), formerly provided local telephone services in Tennessee as a regulated monopoly. Today BST is one of many companies competing to provide local telephone service in Tennessee markets. R. Vol. 16 at 104.

Petitioner BAPCO, a separate subsidiary of BellSouth, is in the business of publishing both white pages and yellow pages telephone directories. Under a contractual arrangement with BST, BAPCO publishes and distributes white pages directories listing the telephone numbers of BST's Tennessee customers. R. Vol. 16 at 37-39. This arrangement satisfies BST's state-law obligation to provide its customers with "a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c); R. Vol. 15 at 131.

BAPCO is authorized to use the BellSouth trademark, and has invested millions of dollars in promoting its directories using that trademark. R. Vol. 17 at 54, 56, 58. BAPCO

customarily places the BellSouth mark on the cover of its directories. *Id.* It is undisputed that "[t]he cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers." R. Vol. 15 at 64 (testimony of AT&T witness Richard Guepe).

BAPCO invests considerable time, effort and expense in enhancing its directories. For example, BAPCO endeavors to make the editorial content and layout of its directories both interesting and appealing. R. Vol. 17 at 54-55, 57-58. It also adds value to the "raw" listings by determining appropriate geographic boundaries for each community, adding bold treatment and logos to its white pages listings, and providing "caption" listings that allow large or multi-site businesses to arrange their listings together in an order that is useful to consumers. R. Vol. 16 at 36. Moreover, because many customers find it convenient to use a single directory, BAPCO often publishes white and yellow page listings for a community together in a single book. *Id.* at 37. BAPCO exercises significant editorial control over the organization, appearance, and content of the yellow pages listings. *Id.* at 36, 39.

BAPCO customarily provides competing carriers with ample access to the white pages directories that it publishes on behalf of BST in Tennessee. First, BAPCO includes in the directories, at no charge, listings for the telephone numbers in the covered area that are served by its competitors. R. Vol. 16 at 39. Second, BAPCO publishes information about BST's competitors in customer guide pages within each directory and permits those companies to purchase additional customer guide pages. *Id.* at 39-40. Third, BAPCO prints on the cover of each directory a statement that the book "[i]ncludes customer listings for all local telecommunications companies." *Id.* at 39.

2. AT&T competes with BST for local telephone customers in Tennessee. BAPCO and AT&T entered into a contract in August 1996 for BAPCO to publish and distribute

directories including listings for AT&T's customers in Tennessee. R. Vol. 16 at 43-44. AT&T sought an agreement from BAPCO to publish its name and logo on the cover of BAPCO's directory. *Id.* at 44-45.

After private negotiations failed to produce an agreement, AT&T petitioned the Tennessee Regulatory Authority ("TRA") for an order declaring, under Tennessee law, that white pages directories published for BST by BAPCO must "include the name and logo of AT&T in like manner to the name and logo of BST, or include no company's name and logo." App., *infra*, 5a. Several other competing local exchange companies serving markets in Tennessee – MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC – applied for and were granted permission to intervene in the proceeding. *Id.*

The TRA conducted a hearing on the petition on July 19, 1997. BAPCO presented undisputed evidence that the directory publishing industry is highly competitive and that it uses the BellSouth mark to brand and differentiate its directories. R. Vol. 16 at 27-50; R. Vol. 17 at 51-81, 90-100. BAPCO also submitted the testimony of an expert witness who had tested consumer reaction to mock directory covers that displayed the names and trademarks of BellSouth, AT&T, and MCI. R. Vol. 17 at 122 – Vol. 18 at 46. A substantial percentage of those surveyed believed that AT&T and MCI were responsible for the publication of the mock directories or were affiliated with BAPCO. R. Vol. 17 at 125-126. The study thus demonstrated that the remedy sought by AT&T would blur BAPCO's individual brand identity and lead to consumer confusion regarding the source of BAPCO's telephone directories. *Id.* at 129-130.

3. On March 19, 1998, the TRA ordered BAPCO to provide AT&T with the opportunity

> to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such direc-

> tories under the same terms and conditions as BAPCO provides to [BST] by contract.

App., *infra*, 154a. In support of that order, the TRA quoted the comments of TRA Chairman Greer. He relied principally on Tenn. Comp. R. & Regs. 1220-4-2-.15 (1997), which mandates the publication of telephone directories and requires that "[t]he name of the telephone utility * * * appear on the front cover." Acknowledging that the rule was enacted when "no more than one utility" served any area, Chairman Greer nonetheless concluded that, under the "logic" of the rule, "if more than one utility's customers are inside the same directory, then more than one utility's name [should] be on the cover." App., *infra*, 150a. Chairman Greer also concluded that including the names of local providers on the cover of the directory would "be helpful to consumers," would "promote competition by showing consumers they have a choice in service providers," and would "allow[] small companies to continue to provide service without the financial burden of having to produce their own directory." *Id.* at 151a.

After the TRA issued its order, Nextlink filed a petition seeking an order requiring BAPCO to include its name and logo on the cover of the directory published by BAPCO in Nextlink's service area. The TRA ruled in favor of Nextlink, concluding that its interpretation of Rule 1220-4-2-.15 "must equally be applied to all similarly situated carriers that seek the same relief." App., *infra*, 166a.

4. BAPCO appealed both orders. Among other things, BAPCO argued that the orders exceeded the TRA's jurisdiction and violated BAPCO's First Amendment rights.

On February 16, 2001, the Tennessee Court of Appeals reversed both orders. App., *infra*, 31a-144a. The majority ruled for BAPCO on both the jurisdictional issue and the First Amendment issue, finding with respect to the constitutional issue that the orders "impose[d] 'forced speech' upon BAPCO in violation of the First Amendment." *Id.* at 54a-

55a, 61a. The court's reasoning with respect to the First Amendment issue was set forth in the concurring opinion of Judge Cain, the relevant portion of which was referenced by the majority opinion and joined by Judge Koch and thus became part of the opinion of the court. *Id.* at 61a.

On the First Amendment issue, the court of appeals stated that "[t]he freedom of speech protected by the [First Amendment] includes [both] the freedom to speak and the freedom to refrain from speaking." App., *infra*, 77a. Citing *Pacific Gas & Electric. Co.* v. *Public Utilities Commission*, 475 U.S. 1, 20 (1986), the court explained that "corporations may not be compelled to use their property or resources to advance the ideological views of others." App., *infra*, 78a. The court acknowledged that in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), this Court held that the government could require a California fruit grower to fund generic advertising helpful to other growers, but it explained that this requirement was merely "the price the competing producers had to pay for the benefit of being protected from free competition in the marketplace." App., *infra*, 79a.[1] The Tennessee court held that *Glickman* was inapplicable to local telephone markets in Tennessee, "because the government is no longer protecting the local telephone service providers from competition." *Id.* at 80a.

The court of appeals thus concluded that BAPCO, and BST, have a "constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors." App, *infra*, 80a. It ruled that the TRA's decision could be upheld only if the orders had a "compelling justification" and were "[no]

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[1] The court of appeals thus anticipated this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), which confined *Glickman* to industries where the government had "replaced competition with a regime of cooperation." *Id.* at 414.

more extensive than is necessary to advance that interest." *Id.* The court found the TRA's orders invalid under that test.

According to the court of appeals, there was little evidence that "placing the names and logos of BellSouth's competitors on the cover of the white pages telephone directory" would "promote the ability of the public to identify the local telephone service providers who serve the calling area covered by the directory." App., *infra*, 80a-81a. The court noted that "providing this information on the cover * * * would simply be redundant because similar information in much more detail is already included in the directory itself." *Id.* at 81a. Indeed, in the court's view, AT&T's demand that its name and logo appear on the cover "was motivated by the desire to increase the public awareness of its brand without incurring the expense of a marketing campaign." *Id.* "Permitting AT&T to be a free rider in the name of promoting competition goes too far for constitutional purposes." *Id.*

5. The Tennessee Supreme Court reversed, holding that the TRA had jurisdiction to enter its orders and that the orders did not violate the First Amendment. App., *infra*, 1a-30a.

In ruling for the TRA on the First Amendment issue, the Tennessee Supreme Court deemed irrelevant several of this Court's significant decisions regarding commercial speech. First, the court rejected BAPCO's argument that it should be guided by *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410 (2001). In that case, this Court invalidated a regulation requiring that a mushroom producer contribute financially to generic advertising that benefited other producers at the expense of distinguishing its own brand. The court below concluded that this Court's holding in *United Foods* was relevant only to "cases involving compelled *contributions* to speech." App., *infra*, 22a. Here, by contrast, the TRA's orders "effectively require BAPCO to engage in *actual speech*." *Id.*

Second, the Tennessee Supreme Court rejected BAPCO's argument that it should evaluate the TRA's orders under the four-part *Central Hudson* test. According to the court, the *Central Hudson* test applies only to "cases involving *restrictions* on commercial speech," not to "cases involving *compelled* commercial speech or *compelled financial support of commercial speech.*" App., *infra*, 23a.

Instead, the court concluded, "the more forgiving standard set forth by the United States Supreme Court in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985)," is "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. In the court's view, that test required it to determine, first, "[w]hether the TRA's disclosure requirement is reasonably related to the state's interest in preventing deception of consumers," and, second, "[w]hether the disclosure requirement is unduly burdensome." *Id.* at 25a. The court found that the TRA's orders satisfied this test.

The Tennessee Supreme Court acknowledged that this case differed from *Zauderer* in that "[t]he rules in *Zauderer* * * * compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors." App., *infra*, 26a. It concluded, however,

> that [t]he ultimate object of the regulations * * * is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Id. at 26a. The court identified the governmental interest underlying the TRA's order not as preventing deception but as "promoting free competition." *Id.* at 28a. According to the court, the orders would "directly advance competition in the provision of local telephone service by effectively informing

consumers as to the existence of alternative local telephone services." *Id.* at 27a.

Having determined that this governmental interest is "important," the Tennessee Supreme Court proceeded to apply "[t]he second step of the *Zauderer* test" – that is, "to determine whether the TRA's orders are unduly burdensome." App., *infra*, 27a. The court found that the TRA's orders "directly advance the state's interest without imposing an excessive burden." *Id.* at 28a. According to the court, "the government's chosen means to advance its goals * * * does not substantially affect BellSouth's ability to communicate its own speech to customers in the market." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly affirmed the First Amendment rights of corporations to engage in non-misleading speech promoting their commercial activities and to refrain from supporting the messages of their commercial or ideological opponents. Nevertheless, the Tennessee Supreme Court has upheld agency orders requiring a directory publisher to use the cover of its product to promote the commercial messages of unrelated companies. The Tennessee court approved these orders after holding that this Court's many speech-protective precedents are simply irrelevant to cases involving government *compulsion* of commercial speech. Instead, the court adopted as "the defining test for First Amendment analysis of compelled speech cases" the relatively "forgiving" standard established in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), for assessing disclosure requirements that correct otherwise *misleading* commercial speech. It did so despite the absence of any evidence that the directory covers were in fact deceptive to consumers.

The Tennessee Supreme Court is not alone in affording such slight protection to commercial actors' right to engage in truthful and nonmisleading speech without having to include content dictated by the government. Several other

courts also have treated *Zauderer* as supplying the standard for evaluating all governmental compulsion of commercial speech. They thus have upheld compelled commercial speech upon a showing of a reasonable relationship between the speech at issue and a substantial governmental interest. In contrast, other courts have construed this Court's decisions to require that *all* regulations affecting non-misleading commercial speech satisfy the *Central Hudson* test. Accordingly, even in the context of compelled speech, these courts require the government to demonstrate that its regulations are no more restrictive than necessary to serve its legitimate purposes. The Court should grant review to clarify that commercial speech compelled by the government to serve interests other than preventing consumer deception must be scrutinized under a standard no less stringent than *Central Hudson*.

The Court should also grant review to establish unequivocally that the First Amendment protects businesses from having to support, through their own speech, commercial messages with which they disagree. In *United Foods*, this Court made clear that a corporation cannot be required to contribute financially to advertising that benefits its competitors. In *Pacific Gas & Electric Co.*, the Court ruled that a corporation may not be required to carry another speaker's views in communications with its own customers. The principles recognized in these cases plainly are offended by a governmental requirement that BAPCO must carry the trademarks of BST's competitors on the face of the directories that BAPCO publishes for BST. The Tennessee Supreme Court refused to recognize the pertinence of *United Foods* and *Pacific Gas & Electric Co.* to compelled commercial speech and, indeed, gave lesser protection to compelled *speech* than to compelled *contributions to speech*. This case provides an important opportunity for the Court to explain that governmental compulsion of *actual* commercial speech is subject to no less scrutiny under the First Amendment than

the level of scrutiny applicable to compelled financial support of speech.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE FIRST AMENDMENT STANDARD FOR EVALUATING GOVERNMENTAL COMPULSION OF COMMERCIAL SPEECH THAT IS NOT NECESSARY TO PREVENT DECEPTION

A. In *Zauderer*, The Court Acknowledged An Exception To *Central Hudson* For Mandatory Disclosures That Serve The Purpose Of Preventing Consumer Deception.

1. In *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the Court established a general rule requiring the application of intermediate scrutiny to governmental restrictions on truthful speech about lawful commercial activities. The Court described the power to regulate such speech as "circumscribed." *Id.* at 564. According to the Court, the state must assert a "substantial interest" to be served by the restriction, and must select a regulatory method that is both "in proportion to that interest" and "designed carefully to achieve the State's goal." *Id.*

The Court explained:

> First, the restriction must directly advance the state interest involved: the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564. The Court emphasized that "[t]he State cannot regulate speech that poses no danger to the asserted state interest, * * * nor can it completely suppress information when

narrower restrictions on expression would serve its interest as well." *Id.* at 565.

The *Central Hudson* standard has evolved into a four-part inquiry for evaluating government restrictions on commercial speech. First, the court must determine whether the speech at issue concerns lawful activity and is not misleading. Second, the court asks whether the asserted governmental interest is substantial. 447 U.S. at 566. "If both inquiries yield positive answers" (*id.*), then the court asks, third, whether the regulation "directly and materially advances the asserted governmental interest." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999). "The fourth part of the test complements the direct advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Id.*

Applying this test, the Court in *Central Hudson* found that a ban on promotional advertising by electric utilities violated the First Amendment because the regulation was more extensive than necessary to serve the state's interest in energy conservation. The Court's recent decisions demonstrate that *Central Hudson* imposes substantial limits on the government's ability to impose restrictions on truthful commercial speech. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504-1509 (2002) (striking down FDA rule seeking to impose restriction on drug advertising); *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2428 (2001) (invalidating restrictions on point-of-sale advertising for tobacco products after concluding that they would be ineffective in achieving their stated purpose); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184 (striking down restriction of casino gambling ads); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (striking down statutes prohibiting advertisement of liquor prices); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1994) (invalidating federal statute prohibiting beer labels from displaying alcohol content);

Edenfeld v. *Fane*, 507 U.S. 761, 770-771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). As we discuss further below (see pages 25-26, *infra*), the TRA's order could not have survived scrutiny under the *Central Hudson* test.

2. The Court explained in *Central Hudson* that "[t]he First Amendment's concern for commercial speech is based on the informational function of the advertising." 447 U.S. at 563. In keeping with that concern, while the government's ability to regulate truthful commercial speech was "circumscribed" (*id.* at 564), it was free to "suppress[] * * * commercial messages" that were "more likely to deceive the public than to inform it." *Id.* at 563. The Court has continued to emphasize that the First Amendment "provides constitutional protection for the dissemination of *accurate* and *nonmisleading* commercial messages." *44 Liquormart, Inc.*, 517 U.S. at 496 (emphasis added).

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), involved commercial speech that was found to have the tendency to mislead its audience. Zauderer, an attorney, had placed an advertisement offering to file suit on behalf of women injured by the Dalkon Shield intrauterine contraceptive device. The advertisement offered to handle such cases under a contingent fee arrangement, stating that "if there is no recovery, no legal fees are owed by our clients." *Id.* at 652. According to the Court, the advertisement suggested that "employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge." *Id.* That was untrue, however, because losing clients would be required to bear certain of their own litigation costs. In these circumstances the advertisement gave rise to a "possibility of deception" that was "self-evident." *Id.*

To avert this risk of deception, the Ohio bar rules required attorneys advertising contingent fee arrangements to disclose in the advertisement the client's obligation to pay costs. Having reiterated that the states and the federal government "are free to prevent the dissemination of commercial speech that is false, deceptive or misleading" (471 U.S. at 638), the Court found that the disclosure requirement easily passed muster under the First Amendment. Observing that disclosure requirements "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," the Court ruled that they are permissible as long as they are "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

The *Zauderer* decision was forecast by the Court's statement in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the State may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, *as are necessary to prevent its being deceptive.*" *Id.* at 772 n.24 (emphasis added). More recently, the Court has reiterated that *Zauderer* supports the compulsion of speech only when the government demonstrates an actual likelihood that consumers will be *misled* absent the required disclosure. See *United Foods*, 533 U.S. at 416 (finding *Zauderer* inapplicable because "[t]here is no suggestion * * * that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers"); *Ibanez* v. *Florida Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) ("[i]f the protections afforded to commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate

them to a material degree") (internal citations and quotation marks omitted).

B. There Is A Split Of Authority Regarding The Relationship Between *Central Hudson* And *Zauderer.*

The lower courts disagree regarding the proper relationship between *Central Hudson* and *Zauderer.* Some courts have held that *Central Hudson* applies only to governmental *limits* on speech, while *Zauderer* applies to all forms of *mandated* speech – whether or not the required speech has the purpose of preventing consumer deception. Other courts have found *Zauderer* applicable only to mandatory factual disclosures that are intended to correct a statement that is demonstrably likely to mislead absent the disclosure. These courts evaluate all other governmental efforts to regulate non-misleading commercial speech – whether they limit or compel such speech – under the more demanding *Central Hudson* standard.

1. The Eleventh Circuit views *Central Hudson* as the touchstone for measuring all efforts to regulate non-misleading commercial speech, including both restrictions on speech and requirements to speak. That court has applied *Zauderer* only once it has determined that speech would be misleading absent the disclosure mandated by the government.

In *Mason* v. *Florida Bar*, 208 F.3d 952 (11th Cir. 2000), for example, the court evaluated the constitutionality of a disclosure requirement imposed on an attorney by the state Bar. The attorney had included in an advertisement the truthful statement that he had received the highest rating issued by Martindale-Hubbell. The Bar insisted that his advertisement also include, among other things, "a full explanation as to the meaning of the * * * rating and how the publication chooses the participating attorneys." *Id.* at 954.

The Eleventh Circuit "determined from the outset that Mason's speech, as truthful information, [was] protectable commercial speech" (208 F.3d at 955) and could be regulated only if *Central Hudson*'s criteria were satisfied. The court concluded that the disclosure requirement failed that test because it did not serve a substantial government interest. Observing that "[u]nfamiliarity is not synonymous with misinformation," the court held that the general public's unfamiliarity with Martindale-Hubbell's rating systems "does not justify imposition of a disclaimer requirement on Mason's truthful advertisement." *Id.* at 957.

The Eleventh Circuit expressly rejected the Bar's argument, under *Zauderer*, that the restriction "should be upheld because it has not insisted upon an outright ban on speech, but merely required the use of a disclaimer." *Id.* at 958. The court stated that "[e]ven partial restrictions on commercial speech must be supported by a showing of some identifiable harm." *Id.* See also *Borgner* v. *Brooks*, 284 F.3d 1204 (11th Cir. 2002), petition for cert. filed, No. 02-165 (July 29, 2002) (evaluating under the *Central Hudson* test a state law requiring disclaimers in certain advertisements by dentists); *Tillman* v. *Miller*, 917 F. Supp. 799, 801 (N.D. Ga. 1995) (invalidating statute requiring attorney advertisements for worker's compensation services to include notice regarding criminal penalties for filing false claims; the court distinguished *Zauderer* by noting that, under the statute, "the advertiser is compelled to speak to protect the public good from fraud or deception by listeners, not by the advertiser"), aff'd, 133 F.3d 1402, 1403 (11th Cir. 1998) (per curiam).

Like the Eleventh Circuit, the Minnesota Supreme Court has applied *Central Hudson* to compelled speech that is not aimed at preventing consumer deception. In *State* v. *Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), the court struck down under *Central Hudson* a requirement that telemarketers employ live operators to make disclosures and obtain consent before playing tape-recorded messages.

2. In contrast, the Tennessee Supreme Court held in this case that *Zauderer*, not *Central Hudson*, is "the defining test for First Amendment analysis of compelled speech cases." App., *infra*, 24a. The court below recognized that by ordering the co-branding of BAPCO's directory the TRA intended to promote competition, not prevent deception. *Id.* at 26a, 28a. Nevertheless, it applied to the mandatory co-branding of BAPCO's directory the "forgiving" standard established in *Zauderer* for evaluating mandatory disclosures aimed at preventing consumer deception. *Id.* at 24a. Accordingly, it upheld the TRA's orders without determining – as it would have been required to do under *Central Hudson* – whether the compelled disclosures materially advanced the state's interest or were "more extensive than is necessary to serve [that] interest." 447 U.S. at 566. See also *Walker* v. *Board of Prof'l Responsibility*, 38 S.W.3d 540, 545 (Tenn. 2001) (ruling that *Central Hudson* applies only to restrictions on speech and that "the less rigorous *Zauderer* standard" applies to governmental regulations that compel commercial speech); *Douglas* v. *State*, 921 S.W.2d 180 (Tenn. 1996) (upholding under *Zauderer* requirement that dentists include disclosures concerning board certification in their advertisements).

Other lower courts also have reflexively applied *Zauderer* to all cases of compelled commercial speech, even when there is no risk that consumers will be misled by the advertisements in the absence of the compelled disclosures. See, *e.g.*, *U S West Communications, Inc.* v. *Thoms*, 1999 WL 33456553, at *29 (S.D. Iowa Jan. 25, 1999) (upholding under *Zauderer* a regulatory order requiring incumbent telephone company to "brand" network service elements provided to competitors); *Kleese* v. *Pennsylvania State Bd. of Funeral Directors*, 738 A.2d 523, 526 (Pa. 1999) (holding that *Zauderer*, not *Central Hudson*, applies to requirement that funeral home include name of permanent supervisor in newspaper advertisements); *Harris* v. *Agency for Health*

Care Admin., 671 So. 2d 230, 231-232 (Fla. Dist. Ct. App. 1996) (holding that *Zauderer*, not *Central Hudson*, should be used to evaluate requirement that therapist include the words "licensed mental health counselor" on promotional materials).

3. The Second Circuit has been of two minds on this question – and its inconsistent decisions illustrate well the lower courts' divergent approaches to compelled commercial speech. Initially, it held that *Central Hudson* provided the standard for evaluating disclosure requirements unrelated to the prevention of deception. Thereafter, however, the court reversed course and concluded that *all* disclosure requirements should be evaluated under *Zauderer*.

The first of these decisions was *International Dairy Foods Association* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996) ("*IDFA*"). There, the court struck down under *Central Hudson* a Vermont statute requiring dairy manufacturers to disclose on the labels milk products derived from cows treated with a synthetic growth hormone. Observing that "[t]he right not to speak inheres in political and commercial speech alike," and "extends to statements of fact as well as statements of opinion" (*id.* at 71), the court treated *Central Hudson* as establishing the "constitutional requirements applicable to compelled commercial speech." *Id.* at 72.

The Second Circuit found that the labeling requirement failed to satisfy *Central Hudson* because the asserted interests in the labeling requirement – "strong consumer interest and the public's 'right to know'" – were "insufficient to justify compromising protected constitutional rights." 92 F.3d at 73. The court explained that consumer curiosity was "insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will." *Id.* at 74. "Were consumer interest alone sufficient," the court added, "there is no end to the information that states could require manufacturers to disclose about their production method." *Id.*

More recently, however, the Second Circuit held in *National Electrical Manufacturers Association* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), cert. denied, 122 S. Ct. 2358 (2002) ("*NEMA*"), that *Zauderer* applies to all compelled commercial disclosures, whether or not the disclosure has the purpose of preventing deception. The statute at issue in *NEMA* required manufacturers of mercury-containing products to label their products and packaging to inform consumers that the products contained mercury and, on disposal, should be recycled or disposed of as hazardous waste. This time, the court ruled squarely that

> *Zauderer*, not *Central Hudson* * * *, describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech.

Id. at 115.[2]

The Second Circuit acknowledged that "the compelled disclosure at issue [in *NEMA*] was not intended to prevent 'consumer confusion or deception' per se, * * * but rather to better inform consumers about the products they purchase." 272 F.3d at 115. Nonetheless, citing *Zauderer*, the court held that the First Amendment was satisfied by a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Id.*

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[2] The Second Circuit acknowledged that it had applied the *Central Hudson* test in *IDFA*, but contended that its decision was "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" 272 F.3d at 115 n.6.

C. *Zauderer*'s "Rational Relationship" Test Should Apply Only When The State Requires Disclosure To Prevent A Genuine Risk Of Consumer Deception.

This case provides the Court with the opportunity to eliminate the confusion between the *Central Hudson* and *Zauderer* tests in the frequently recurring context of compelled commercial speech that does *not* serve the purpose of preventing consumer deception. Deciding this case will permit the Court to explain whether all compulsion of commercial speech is subject to a "reasonable relationship" test, such as the Court applied to the mandatory disclosure in *Zauderer*, or whether that test applies only to factual disclosures that reduce a genuine risk of consumer deception otherwise created by the associated commercial speech.

1. The Tennessee Supreme Court erred in concluding that a "rational relationship" test taken from *Zauderer* defines "the First Amendment analysis of [all] compelled speech cases." App., *infra*, 24a. By its own terms, the *Zauderer* test applies only to mandated disclosures that serve the government's "interest in preventing deception of consumers" caused by the commercial speech itself. 471 U.S. at 651. The Court found it "self-evident" that the attorney advertisement at issue in *Zauderer* was likely to mislead consumers by causing them to believe that an unsuccessful lawsuit would cost them nothing when in fact they would bear their own costs. Having previously stated that the government may simply "ban forms of communication more likely to deceive the public than to inform it" (*Central Hudson*, 447 U.S. at 563), it is not surprising that the Court readily approved a mandatory disclosure designed to prevent such deception.

Nothing in the Court's decisions, however, suggests that *Zauderer* should apply, across the board, to every regulation that mandates commercial speech. As noted above (at page 15), the Court has repeatedly cautioned – as recently as last

year, in *United Foods* – that *Zauderer* does not apply unless the state demonstrates an actual likelihood that consumers will be misled absent the disclosure. In other contexts, this Court has recognized that the freedom *not* to speak can be as important as the freedom *to* speak. See, *e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The Court has also made clear that corporations, like individuals, have a right not to disseminate messages with which they disagree. *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

Regulations that require speech can burden First Amendment freedoms at least as much as restrictions on speech. That is clearly demonstrated by the TRA's orders, which by mandating the publication of the logos of other companies strip BAPCO of its ability to use the covers to identify, differentiate, and promote its own brand of directories. Indeed, as this case shows, compulsion and restriction of speech are two sides of the same coin. To the extent that BAPCO is *compelled* to print the logos of other companies alongside its own trademark, it is flatly *barred* from identifying its directories by its mark alone. See *Pacific Gas & Elec. Co.*, 475 U.S. at 15 (order forcing public utility to carry opposing messages in its customer correspondence "necessarily burdens the expression" of the utility). Thus, in this case the compelled speech interferes substantially with "the free flow of commercial information" that is "indispensable to the proper allocation of resources in a free enterprise system." *Coors Brewing Co.*, 514 U.S. at 481-482 (internal quotation marks omitted).

Accordingly, the "reasonable relationship" test provides insufficient protection to the right to engage in truthful and non-misleading commercial speech. Were it enough for the state to demonstrate a "reasonable relationship" with *any* legitimate governmental interest, there would be no end to the

disclosures, statements, and other messages that the government could append to lawful commercial speech. Again, this case proves the point, because an administrative agency has effectively assumed editorial control over the cover of a private company's principal product line to serve an ostensible public interest in promoting competition in a recently deregulated industry.

Except when necessary to prevent a commercial message from misleading consumers, governmental compulsion of commercial speech should be subject to scrutiny that is no less stringent than the standard set forth in *Central Hudson.* Just as when it *limits* speech, the state's ability to prescribe content for commercial messages should be no broader than is necessary to serve its substantial and legitimate interests.

2. Under a proper understanding of *Zauderer*, the Tennessee Supreme Court had no basis for applying its "reasonable relationship" test to the TRA's orders. First, at no point did the TRA find that BAPCO's covers were *misleading* to consumers. See TRA's Application for Permission to Appeal, at 14 n.17 (conceding that the speech at issue was "not misleading"). Second, the TRA ordered a remedy that was far more intrusive than the factual disclosure considered in *Zauderer*.

As noted above, BAPCO is authorized to, and regularly does, use the BellSouth trademark to identify and differentiate its directories. R. Vol. 17 at 54, 56, 58. BAPCO, and BAPCO alone, designs, publishes, and distributes these directories to consumers. Thus, BAPCO's use of the BellSouth trademark on its directory *accurately* conveys to consumers important information concerning its source. Indeed, precluding BAPCO from branding its directory with the BellSouth trademark – and only that trademark – prevents BAPCO from differentiating its product from competing directories. This limitation on BAPCO's ability to use its own brand to identify its directories deprives consumers of information

that would help them choose among competing directory products. The mandatory co-branding also *inhibits* competition by depriving BAPCO – and ultimately the other directory publishers that may be affected by the TRA's orders – of the benefits of creating a superior product. This reduces the incentives for continued product improvement.

In fact, the TRA's orders would *create* rather than eliminate consumer confusion. BAPCO presented undisputed empirical evidence that including the logos of unrelated companies on directory covers would cause consumers to believe that those other companies had published the directories. R. Vol. 17 at 125-126. There also was evidence that customers would interpret the cover to mean that BAPCO and the other companies were related. *Id.* Accordingly, the key value underlying the Court's commercial speech cases – ensuring that private economic decisions are "intelligent and well informed" (*Virginia Bd. of Pharmacy*, 425 U.S. at 765) – would be *undermined* by the TRA's orders.

Moreover, the TRA did not order a straightforward factual disclosure of the type at issue in *Zauderer*. A "disclosure" in the Court's cases is a statement of fact conveying an uncontroversial message. For example, the statement (which already appears on BAPCO's directory covers, see page 4, *supra*) that the book contains numbers served by all competing carriers is such a disclosure. By contrast, the TRA ordered BAPCO to carry the commercial symbols of BST's competitors on the cover of its product. That is not a factual statement, but a forced association with competing brands that would undermine BAPCO's efforts to convey to consumers that there is a *difference* between its directories and those published by other companies.

Finally, in *Zauderer* the disclosure provided additional information *about the speaker* (*i.e.*, the cost of his services) that was directly relevant to the commercial speech at issue. Here, BAPCO was required to provide information about

other companies, not directly relevant to the speech at issue, in order to enhance the ability of those other companies to compete against BST. *Zauderer* plainly does not allow the government to override a corporation's First Amendment right *not* to speak merely upon establishing a "reasonable relationship" to a legitimate state interest.

3. At a minimum, as a substantial restriction of lawful commercial speech, the TRA's orders should have been subject to the *Central Hudson* test. The orders clearly fail the third and fourth prongs of that test because, even assuming the asserted governmental interest is substantial, the TRA's orders do not "directly advance[]" that interest and are "more extensive than is necessary to serve that interest." 447 U.S. at 566.

The Tennessee Supreme Court stated that the goal of the TRA's ruling was to "inform[] consumers about their choices in the local telecommunications service market." App., *infra*, 28a. Even assuming that the government may legitimately mandate speech by one competitor to serve the interests of another, the co-branding of BAPCO's white pages directory does not further that goal. To the contrary, the appearance of multiple companies on the cover would suggest to many consumers that the companies are related or are providing phone service together in some sort of joint venture that does not create consumer choice.

In addition, other measures both more effective and less burdensome than the co-branding of BAPCO's directory could be used to inform consumers that they have a choice among local telephone service providers. A statement on the cover that the directory includes numbers served by all of the competing carriers would suffice, as would the inclusion of information about competitors within the directory. Of course, competing phone companies also can and do use many other avenues – including traditional advertising, direct

mail, and the distribution of their own directories – to publicize their services.

At the end of the day, the TRA made no effort to "carefully calculate[] the costs and benefits associated with the burden on speech" imposed by its order, as the First Amendment requires. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (internal quotation marks omitted). The TRA simply decided that the "logic" of a long-outdated rule required the cover of a telephone directory to include the names and logos of the companies serving the telephone numbers within it. App., *infra*, 150a. It then concluded, almost as an afterthought and without evidentiary support, that this would be helpful to consumers and would promote competition. *Id.* at 151a. That is hardly enough to justify the TRA's severe restriction of BAPCO's First Amendment right to use the cover of its book as a vehicle for its own, and BST's – and not their competitors' – commercial messages.

II. THE COURT SHOULD GRANT REVIEW TO AFFIRM THE FIRST AMENDMENT RIGHTS OF CORPORATIONS *NOT* TO CARRY THE MESSAGES OF THEIR COMMERCIAL COMPETITORS

The TRA's orders represent an extreme intrusion upon the First Amendment because they require BAPCO to use the cover of its telephone directories to promote the brands of BST's competitors rather than to differentiate and publicize its individual brand. This Court has acknowledged that the First Amendment protects the rights of corporations not to utter the political messages of their opponents or to support the commercial messages of their economic competitors. This case provides the Court with an opportunity to explain the significance of these principles in cases involving compelled commercial speech.

1. In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1, 15 (1986), the Court ruled in a plurality opinion that a corporation has the right not to "associate with speech with which [it] may disagree" and thus could not be compelled to carry the controversial messages of a third party. Accordingly, the Court struck down an order of the Public Utility Commission requiring a privately owned utility company to carry within its billing envelope a newsletter published by a citizen's group that was sometimes critical of the utility.

The Court explained that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." 475 U.S. at 16. Thus, to require the utility "to use *its* property as a vehicle for spreading a message with which it disagrees" seriously impinged on the utility's First Amendment rights. *Id.* at 17. Although the utility had no right "to be free from vigorous debate," it *did* "have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 14. As a result, the Court ruled that the government could support a "content-based grant of access to [the speaker's] private property" only by demonstrating that its order was narrowly tailored to serve a *compelling* governmental interest. *Id.* at 16-17. Because the state could further its interest "through means that would not violate [the utilities'] First Amendment rights" (*id.* at 19), the Court held the requirement at issue to be unconstitutional.

The Court in *Pacific Gas & Electric* also made clear that the government's "substantial leeway in determining appropriate information disclosure requirements for business corporations" did not support the Commission's order.

> Nothing in *Zauderer* suggests * * * that the State is equally free to require corporations to carry the messages of third parties, where the messages them-

> selves are biased against or expressly contrary to the corporation's views.

475 U.S. at 911 n.12. See also *Central Illinois Light Co.* v. *Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) ("While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their ideological opponents").

Pacific Gas & Electric disapproved the compulsion of public speech by a corporation in support of its opponents, while the TRA has compelled BAPCO to publish commercial messages with which it disagrees. As we discuss further below, however, First Amendment rights are strongly implicated by the forced support of commercial, as well as political, messages. Just last year, this Court held that the First Amendment prevents the government from forcing a corporation to provide *financial support* for a purely commercial message with which it disagrees. Drawing lessons from *Pacific Gas & Electric*, the Court should hold that the government must meet an exacting standard – certainly, one no less stringent than *Central Hudson* – when it requires corporations to convey the commercial messages of their economic competitors.

2. The Court's ruling in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), makes clear that the First Amendment fully protects the rights of corporations not to provide financial support for commercial messages that they oppose. The Tennessee Supreme Court, however, dismissed as "inapposite" *United Foods* and the Court's other decisions concerning compelled contributions to speech, because the TRA orders "effectively require BAPCO to engage in *actual speech*." App., *infra*, 22a.

In *United Foods*, the Court ruled that the government could not require a mushroom producer wishing to tout the superiority of its own brand to fund generic mushroom ad-

vertising. The Court recognized that commercial messages promoting a product are significant to the speaker and protected by the First Amendment. As the Court explained:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

533 U.S. at 410. Accordingly, requiring a producer to subsidize advertisements promoting mushrooms in general, rather than its own brand, triggered First Amendment concerns because the producers were being required to "subsidize speech with which they disagree." *Id.* at 411. Noting that the mushroom producer "objected to being charged for * * * [t]he message * * * that mushrooms are worth consuming whether or not they are branded," the Court added:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.

Id.

The principles recognized in *United Foods* compel the conclusion that BAPCO has a powerful First Amendment right *not* to be required to dilute its own commercial message by sharing its directory cover with the logos of BST's competitors. The Tennessee court deemed *United Foods* to be inapplicable because it concerned contributions to speech rather than actual speech. But to treat compelled *actual*

speech as entitled to less First Amendment protection than compelled *contributions* to speech is indefensible. A government requirement that BAPCO stamp its chief vehicle for identifying and promoting its product with the brand names and logos of BST's competitors plainly invades BAPCO's First Amendment freedoms *more*, not less, than would a compelled subsidy of advertising by those competitors. See *United Foods*, 533 U.S. at 413 (suggesting that to be "required simply to support speech by others" is *less* burdensome than a requirement "to utter the speech itself"); *Pacific Gas & Elec. Co.*, 475 U.S. at 16-17 (explaining that a "content-based grant of access to private property" creates a "danger that the government may not impose absent a compelling interest").

Moreover, *United Foods* confirms that the *Zauderer* standards, which the Tennessee Supreme Court elected to apply, have no bearing on this case. In *United Foods*, the Court ruled that *Zauderer* was inapplicable because "[t]here is no suggestion in the case * * * that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers." 533 U.S. at 416. Here, too, the agency conceded that the mandatory co-branding of BAPCO's directory was not necessary to make them nonmisleading to consumers. See TRA's Application for Permission to Appeal, at 14 n.17. In sum, the court below plainly erred in applying *Zauderer* rather than *United Foods* to the TRA's orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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